



Tennessee Human Rights Commission Employment
Law Seminar

FMLA Overview & Update

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Presented by

Kara E. Shea

Butler, Snow, O'Mara, Stevens & Cannada, PLLC

Kara.shea@butlersnow.com

615-651-6712

What is FMLA?

- Family & Medical Leave Act
- Around since 1993
- Federal law
- Provides 12 weeks of leave IF
 - Employee is eligible
 - For a covered reason
- Leave is
 - Unpaid
 - Job-Protected

Which employees can take FMLA leave?

- Been employed for at least 12 months (does not need to be consecutive)
 - Any week in which employee is maintained on the payroll counts (including weeks when no work is performed)
 - Time worked as a temporary employee counts
 - Tennessee Maternity Leave Act different
- Has worked at least 1,250 hours during the 12 months prior to the leave request (consecutive)
 - Only actual work time counted
 - Leaves of absence, paid or unpaid, including FMLA leave, not counted

How do you deduct leave?

- FMLA leave is based on the employee's normal workweek.
 - If employee normally works a 5-day week and takes off one day, the employer should deduct $\frac{1}{5}$ of a week of FMLA leave
 - If employee who normally works an 8-hour day is put on a 4-hour per day reduced leave schedule, he would use $\frac{1}{2}$ week of FMLA leave each week
- When employee works part time, FMLA deduction is made on a pro-rate basis by comparing new schedule with old schedule.
 - If employee normally works 30 hours per week, but is put on a 20-hour per week reduced schedule, he is using $\frac{1}{3}$ week of FMLA leave each work week.
- There is no limit on the size of an increment of leave which may be taken under a reduced or intermittent schedule.
 - But employer can limit leave to shortest period of time its payroll system uses to account for absences or use of leave, provided it is one hour or less.

Types of Leave

- Single Block of Leave
- Intermittent Leave: Leave taken in separate blocks of time for a single illness or injury.
 - Can be for planned treatments
 - Or for conditions which “flair up” unexpectedly and prevent employee from doing his job (migraines, arthritis, lupus, bad back, etc)
- Reduced leave schedule: Leave which results in regular alteration/reduction of scheduled work hours during the certified period.
 - Employee is entitled to be given a reduced leave schedule if condition qualifies
 - Does NOT apply to leave to care for a child—but employer may voluntarily designate such an arrangement
 - But employee cannot be forced to take off more time than he needs

Under what circumstances may an employee take leave?

- Birth of a child
- Placement of a child for adoption or foster care
- **To care for a spouse, child, or parent with a serious health condition**
- **Because of the employee's own serious health condition**
- Military caregiver
- Military exigency

12 Week Limit

- Employees may have multiple FMLA certifications for multiple reasons
- But the rule is 12 weeks per 12 month period, for ALL reasons
 - Not 12 months per certification
- For military caregiver leave only, 26 weeks must be provided

Birth of a Child

- Both mothers and fathers are eligible
 - But if they work for the same employer, they are only entitled to 12 weeks *jointly*
 - *They can split up the leave however they want*
 - *Can overlap*
 - *Each spouse eligible to take his or her own remaining weeks for other purposes*
- Remember, this is a separate kind of leave from leave related to pregnancy

Adoption or Foster Care

- Covers absences required in order for the placement to occur
 - Attorney meetings
 - Court appearances
 - Doctor visits
 - Going to pick up the child
- Foster care leave only applies to arrangements sanctioned by state
 - Employer has right to request documentation
 - Rule applies even if children are relatives of your employees

General Categories of Serious Health Conditions

- Inpatient care
- Pregnancy-related conditions
- Conditions resulting in more than three days of incapacitation
- Chronic health conditions
- Treatment to prevent incapacitation or restorative surgery

Serious Health Conditions

Incapacity Plus Treatment

- Employee must be incapacitated for at least 3 consecutive, full calendar days *and either*:
 - Receive **two treatments by HCP**
 - Receive one treatment plus **regimen of continuing treatment**

Serious Health Conditions

Two Treatments by HCP

- Three days of incapacity, plus:
 - One treatment within first 7 days of incapacity;
 - AND
 - Two treatments within 30 days of first day of incapacity;
 - HCP decides whether and when 2nd treatment is warranted
- Treatment in this context means an in-person visit with HCP

Serious Health Conditions

Regimen of Continuing Treatment

- Three days of incapacity, plus both:
 - At least one treatment by HCP in first seven days of incapacity
 - Treatment in this context means in-person visit with HCP
 - Regimen of continuing treatment
 - Continuing treatment includes course of prescribed medication, therapy
 - Does not include over-the-counter meds, rest, fluids, exercise, etc. (even on doctor's orders)

Serious Health Conditions

Chronic Conditions

- At least two treatments by health care provider per year
 - Again, this means in-person visits
 - HCP decides whether and when treatment is warranted
- Need not visit HCP for every episode or flare-up
 - Self care allowed if HCP advises (*e.g.*, asthmatic told to stay home if pollen count is high)
- No requirement of three days incapacity

Care for Loved Ones

- Spouse
 - Husband or wife as defined by state law
 - Includes common law marriage
- Son or daughter
 - Biological child
 - Adopted or foster child
 - Stepchild
 - Legal ward
 - Any child employee has day-to-day responsibility for (both practical care and financially)
 - Under 18, or incapable of caring for herself due to mental or physical disability
- Parent
 - Biological or adopted parents
 - Does not include in-laws, grandparents, or step-parents, unless that individual acted as a parent to the employee when he was a child
- *In loco parentis* rule
- **You can request documentation—but proceed with care!**

Serious Health Conditions

“Needed to Care For”

- Covers both physical and psychological care (comfort and reassurance)
- Can be intermittent, even if condition is not
- Includes making arrangements for changes in care, such as transfer to nursing home
- Employee need not be only possible caregiver
 - Watch out for gender stereotypes

Certification of Serious Health Condition

- You can require certification for:
 - EE's serious health condition
 - Family member's serious health condition
- No certification for leave to care for healthy newborn/adopted/foster child
 - May require documentation of absences due to adoption/foster process
- Documentation of family relationships
- Medical certification for military caregiver leave discussed in later session

Medical Certification

How to Request

- Certification info is covered in eligibility notice, rights and responsibilities notice
 - Attach certification form
 - May want to include job description/essential functions
- Request first medical certification in writing; may make later requests orally
- Inform employees of consequences if they don't furnish certification

Medical Certification

Timing of Employer's Request

- Employer must provide notice/request certification within 5 business days of: 1) receiving notice of need for leave; or 2) beginning of leave
 - See DOL Form WH-381 (as amended)
- Failure to provide notice may constitute FMLA interference
- Even with lack of proper notice, employer may retroactively designate leave as FMLA if:
 - It provides notice of such designation to employee and no harm will result; or
 - Employee agrees to retroactive designation

Medical Certification

Timing of Employee's Response

- Employee must provide certification within 15 calendar days
 - Extension possible if doing so was not practicable despite diligent efforts
 - If no valid reason for extension, employer may deny leave
- FMLA doesn't protect any leave taken without proper certification

Medical Certification

How Often?

- Recertification every 6 months for continuing condition, with absence
 - **May not** seek authentication, clarification, second and third opinions
- Annual certification for condition lasting more than one leave year
 - **May** seek authentication, clarification, second and third opinions

Medical Certification

Contents

- When condition began, probable duration
- Enough medical facts to support leave
 - 2008 regs allow employers to request diagnosis
- Medical necessity for intermittent leave and expected duration
- Info on planned treatment

Medical Certification

Contents

- If leave is for EE's serious health condition, must show he can't perform job's essential functions, for how long, job restrictions
 - Needing to see doctor = unable to perform essential functions regardless of EE's current condition
 - DOL form WH-380E (as amended)
- If leave is to care for family member, show need for care, frequency, duration of leave
 - DOL form WH-380F (as amended)

Medical Certification

Problems with Certification

- Incomplete certifications: Some required entries are left blank
- Insufficient certifications: All entries are completed, but answers are vague, ambiguous, or nonresponsive
- Questions of authenticity
- It is employee's responsibility to provide sufficient certification

Medical Certification

Addressing Problems

- First, inform EE in writing what additional info is needed
 - DOL Form WH-382 may be used for this purpose
- EE has 7 calendar days to obtain corrected certification
 - Unless impracticable to do so despite good efforts
- If EE doesn't fix, employer may:
 - Deny FMLA leave; or
 - Contact HCP for missing info (appears to be allowed, but not required)

Medical Certification

Reasons to Contact HCP

- Authenticity: Ask the HCP who signed certification to confirm that he really completed or authorized the information it contains
- Clarification: Ask HCP to help you understand handwriting, meaning of responses

Medical Certification

Rules for Contacting HCP

- Contact may be made:
 - Through another HCP; or
 - Directly by HR, FMLA administrator, management official (but not EE's direct supervisor)
- No inquiries allowed beyond scope of certification
- Get employee's permission to contact HCP if HIPAA applies
 - If employee denies permission and fails to correct certification, you may deny leave

Medical Certification

Second Opinions

- Allowed if you have reason to doubt validity of certification
- At employer's expense
- EE receives FMLA benefits provisionally while waiting for opinion
- If info doesn't support FMLA, may treat leave as paid/unpaid per your policies
- May deny FMLA leave if EE doesn't release medical info to 2nd HCP

Medical Certification

Third Opinions

- Allowed if first and second opinions differ
- At employer's expense
- Third opinion binding
- HCP must be approved jointly by employer and employee
- May deny FMLA leave if EE doesn't release medical info to 3rd HCP

Medical Certification Recertification

- Generally, you may request recertification every 30 days, only in connection with an absence
 - May request **before** 30 days have passed if:
 - Employees requests more leave
 - Significant change in circumstances
 - You learn info that causes you to doubt certification
 - May not request every 30 days if first certification says EE will be incapacitated **more than 30 days**
 - But recertification may in any event be requested every six months

Reinstatement Requirements

General Rule

- Employee returning from leave must be reinstated to same or equivalent position as before taking leave
 - Compensation
 - Benefits and perks
 - Responsibilities

Serious Health Conditions

Intention to Return to Work

- May ask EEs to report periodically on their status and/or intent to return to work
- If EE expresses unequivocal intention not to return to work, your FMLA obligations are over
 - May not terminate early even if:
 - Employee says she thinks she won't be able to return at end of leave, and
 - It turns out that she actually couldn't have

Fitness-for-Duty Certification

- You may require one before allowing employee to return to work if:
 - Leave is for EE's own condition
 - You have uniformly applied policy that similarly situated EEs provide FFD certification
 - You provided proper notice of the requirement (in handbook or Designation Notice)
- At employee's expense

Employer Notice Requirements

General Notice

- Advises workers of FMLA rights
 - If substantial number of EEs lack English literacy, must provide translation
 - May be provided electronically if all EEs/applicants have access
 - WHD Publication 1420

Employer Notice Requirements

General Notice

- Two separate requirements
 - Post notice conspicuously at worksite
 - Applies even if ER has no eligible employees
 - Provide written notice to all employees
 - In handbook or to new employees upon hire
 - Applies to employers that have at least one eligible employee at work site

Employer Notice Requirements

Eligibility Notice

- Give within 5 days of receiving notice of need for leave
- Also advise on certification, use of paid leave, benefits, including premiums, key employee status
- If not eligible, give at least one reason
- DOL Form WH-381 (as modified)

Employer Notice Requirements

Rights and Responsibilities

- Notice of rights and responsibilities must:
 - Be given with each eligibility notice
 - Advise EEs on
 - Substituting paid for unpaid leave
 - Certification
 - Premiums for health care
 - Include all forms EE needs to fill out and submit
- Combined with Eligibility Notice in DOL Form WH-381 (as modified)

Employer Notice Requirements

Subsequent Notices

- Check whether EEs continue to be eligible:
 - At beginning of each FMLA year
 - When leave is requested for a new reason
- New eligibility and rights/responsibilities notices required in both situations

Employer Notice Requirements

Designation Notice

- Informs employee in writing whether leave qualifies as FMLA. It must:
 - Be provided within 5 days after employer has enough info to determine whether employee qualifies for leave
 - May take longer with extenuating circumstances
 - Advise employee about substitution of paid leave requirements
 - Inform employee of any fitness-for-duty requirements
 - Attach list of essential job functions

Employer Notice Requirements

Retroactive Designation

- Employer may designate leave retroactively unless it would cause harm or injury to employee
 - Example: Employee wouldn't have taken leave if she had known it would be counted as FMLA, later runs out of leave
- Employer and employee may mutually agree to retroactive designation, regardless of harm

Employee Notice Employer's Policies

- You generally may require EEs to follow your usual notice procedures for other types of leave
- Your usual procedures can't contradict FMLA's. Examples:
 - Can require written notice
 - Can't require more than 30 days notice

Employee Notice

Timing

- Foreseeable leave: 30 days notice or as soon as practicable
 - You may ask employee to explain why he didn't give 30 days' notice, delay leave if no good reason
- Unforeseeable leave: Must give as soon as practicable

Employee Notice

Content

- No magic words (“FMLA”) required
 - But “I’m sick” isn’t enough
- Must give enough info to make employer aware that FMLA leave is needed
- EE need not put notice in writing
 - Unless you require it for FMLA and other types of leave
- Confirm oral notice in writing

Employee Notice Failure to Provide

- If EE doesn't follow notice procedures, you may delay or deny FMLA unless there are "unusual circumstances." Examples:
 - You specify number to call, no one there
 - You specify number, voice mail box is full
- EE must cooperate, answer questions on whether absence is FMLA-qualifying
 - If she doesn't, you may deny FMLA

Termination After Leave

- Has EE used up all leave entitlements?
- Has EE received greatest benefit under all applicable laws?
- How did you treat similarly situated EEs?
- What about timing?
 - Closer adverse action is to leave, more likely there's a problem

Termination After Leave

- If decision is based on attendance:
 - Nondiscriminatory written policy?
 - FMLA leave counted against her?
- If ADA applies, is there a reasonable accommodation?

If Both Laws Apply

Leave as Accommodation

- If FMLA leave exhausted, consider extension as ADA reasonable accommodation
- No time limit on ADA leave if no undue hardship to you
- Be consistent with extended leaves

Deadliest mistake: terminating an FMLA-covered employee for what you believed was a legitimate reason.

- Termination checklist
 - Have you done everything right?
 - Is your written policy in compliance?
 - Have you provided adequate notices?
 - Have you given the employee sufficient time?
 - Have you put everything in writing?
 - How have you treated similarly-situated employees who have not requested FMLA leave?

Types of FMLA Claims

- Interference:
 - Employee entitled to leave, employer denied it
 - No intent to violate FMLA required
- Retaliation:
 - Discrimination based on employee requesting/making FMLA claim
 - Intent required

FMLA Interference/Retaliation

- Denial of leave
- Discouraging EE from taking leave
- Manipulation by ER to avoid FMLA responsibilities (*e.g.*, moving EEs around to avoid the 50-employee eligibility requirement)
- Failure to provide required notice
 - Even without any other FMLA violation
- Subjecting employees to adverse action because they have requested or taken FMLA leave

FMLA Claims

Preventive Measures

- To prevent claims:
 - Watch the timing of any adverse actions against EEs seeking/taking FMLA leave
 - Even if you allow leave, take care when basing adverse action only on factors predating EE's return to work because EE may argue a link to FMLA leave

FMLA Interference

Preventive Measures

- Educate managers and supervisors
 - Most violations originate with uneducated or sloppy supervisors
 - Good documentation is crucial in breaking any alleged link between adverse action, FMLA rights
 - They may be liable for FMLA violations
- When in doubt, and in close cases, consult with experienced counsel